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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. **1060**

DISTRICT OF COLUMBIA, FOR THE USE AND BENEFIT OF CAPITAL LIGHTING AND SUPPLY INC., *Petitioner,*

v.

MERANDO INC. AND NEW AMSTERDAM CASUALTY CO. *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRWIN S. LANDAU
501 - 13th St. N.W.

I. IRWIN BOLOTIN
1030 - 15th St. N.W.
Washington, D. C.

Attorneys for Petitioner

Date: April 8, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Capital Lighting and Supply Inc. a corp. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Reprinted as Appendices to this Petition, with the letter designations noted are:

(a) Order of District Judge Jones of the United States District Court for the District of Columbia; (b) Judgment of the United States Court of Appeals for the District of Columbia Circuit (no opinion

handed down); (c) Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing en banc.

JURISDICTION

The judgment of the Court of Appeals was entered Nov. 10, 1964. A timely Petition for rehearing en banc was filed and was denied by the Court below by its order entered Jan. 19, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 1.

Rule 19 of this Court.

QUESTION PRESENTED

I

When, in accordance with the established administrative practice of a government department having charge of a construction contract, the administrative offier of such department has been notified by the head of the department that the contract has been completed, and is directed to determine the amount of final payment due to the contractor, and the administrative officer determines and records the amount of such final payment, and prepares all the documents pertaining to such final payment, the question presented is whether such action by the administrative officer constitutes a "final settlement" within the meaning of Title One, Section 804 of the District of Columbia Code (1961 Ed.) which authorizes a person supplying the contractor with materials to bring suit under the contractor's bond, if no suit is brought by the District of Columbia within six months from the completion and final settlement of said contract.

II

Did Petitioner commence its suit two days too soon, or, what was the date of final settlement?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 1, Section 804 of the District of Columbia Code, 1961 Ed. provides in part as follows:

> "* * * If no suit should be brought by the District of Columbia within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the District of Columbia that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the District of Columbia in the United States District Court for the District of Columbia, irrespective of the amount in controversy in such suit, and not elsewhere for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the completion performance and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later * * *"

STATEMENT OF THE CASE

Respondent, Merando Inc. as general contractor, entered into a contract with the District of Columbia for the construction of a school building. As required by statute, respondent executed a performance and payment bond with respondent, New Amsterdam Casualty Co. as surety which bond provided for payment of persons furnishing labor and material on said school job. Merando Inc. entered into a contract with F. S. Bowen Electric Co. Inc. as sub-contractor for the electrical work on the school building. Bowen Electric Co. in turn contracted with petitioner for the purchase of the necessary electrical fixtures. Petitioner furnished the electrical fixtures used in the school building, in the sum of $6409.00 and was not paid.

Merando Inc. received partial payments as the building progressed. In accordance with established administrative practice, Mr. Jame Blazer, the director of Buildings and Grounds of the District of Columbia, notified Mr. Arnold Olson, the administrative officer of the Auditing Department in writing on March 20, 1961 that the said contract was completed and the school building had been accepted as of August 27, 1960 by the District of Columbia. Mr. Olson was authorized and directed to take appropriate action to determine and expedite the final payment due on the contract.

Mr. Olson completed the final audit on June 13, 1961 and it was determined by him that $47,523.45 was due to Merando Inc. as final payment by the District of Columbia for the construction of the school. He prepared at the same time a release of claims which Merando Inc. executed on June 19, 1961, accepting the figures of the District of Columbia auditor as the

amount due him in full payment under the contract by the District of Columbia.

A payment voucher was approved by the Deputy Director of Buildings and Grounds of the District on June 22, 1961. Several officers of the District of Columbia initialled the said payment voucher afterwards and on June 30, 1961, the District of Columbia paid said sum to Merando Inc. Suit was filed by petitioner on Dec. 20, 1961.

A trial was held in U. S. District Court and the Trial Court rendered an Order dismissing petitioner's suit, holding that June 22, 1961, was the date of final settlement, and that petitioner's action was brought prematurely by two days.

REASONS FOR GRANTING THE WRIT

This case is of importance far beyond the particular parties involved. It involves a fundamental constitutional issue concerning a citizen's right to recover monies admittedly due to him pursuant to a statute when such citizen has supplied materials on a public building. It is fundamental that a citizen who supplies labor or materials upon a public building cannot file a mechanics lien against such building, and, accordingly, it was necessary in order to protect such citizens, that Congress pass a statute providing for the necessity of a bond to be filed in order to assure payment to the citizens supplying such labor or materials, who usually are persons of little means.

The lower courts took the position that the suit filed by Petitioner was instituted two days too soon thus placing a very narrow and erroneous interpretation upon the statute involved. By so doing the lower courts deprived the petitioner of due process by fail-

ing to protect him in his right to recover for the materials furnished on this school building. Furthermore the decision in this case by the lower courts fails to follow applicable decisions of this Court and also fails to give a liberal consideration to the applicable statute which was intended not only by Congress but which is clearly stated in the language of the applicable decisions of this Court.

Title I Sec. 804 was passed for the purpose of protecting persons who furnishel work, labor or materials for the construction of buildings for the District of Columbia Government. The D. C. statute is the same as the Heard Act which was formerly in force affecting U. S. Government jobs. When the Heard Act was in force and effect on United States jobs the General Accounting Office, upon request, issued a certificate giving the date of final settlement.

The District of Columbia will not give a certificate as to date of final settlement. They refuse to set or name the date of final settlement.

As a result persons furnishing labor and materials for District of Columbia jobs have to ascertain, as best they can, the date of final settlement. It was never intended that this statute result in a guessing game.

Petitioner respectfully claims that if the date of final settlement in this case was not June 13, 1961 then it should certainly be June 19, 1961. According to applicable decisions of this and other Courts, the date of final settlement is not date of payment, but the date when the administrative officer having the contract in charge determines that the contract has been completed and the amount due upon the contract has been *administratively determined.*

In this case the Director of Buildings and Grounds notified the administrative officer of the Auditing Department, Mr. Olson, that the building was complete and that the District had accepted it. On June 13, 1961 Mr. Olson determined the amount that was due to Merando under the contract, namely $47,523.45. If June 13 is not the date of final settlement then certainly when the prime contractor, Merando, signed a release of claims accepting these figures on June 19, 1961, there was an agreement between the parties that the amount was due and fixed. The trier of this cause selected date of final settlement as of the time when Mr. Blazer's office approved the *payment voucher.* Since approximately four other people including the Corporation Counsel had to initial this payment voucher subsequently, the Court might very easily have found that one of the subsequent unknown dates was the date that the payment voucher was finally approved. This is not the law as Petitioner interprets it.

The United States Court of Appeals, D. C. Circuit has held that "final settlement" does not mean "payment" or "agreement" and *does not involve absolute administrative finality.* Thus, in the case of *United States Casualty Company* v. *District of Columbia,* 71 App. D.C. 92, 107 F. 2d 652, the Court said: "Under the Heard Act 'final settlement', not completion of performance, is the crucial event for starting the statutory periods. This does not mean "payment" or 'agreement'. Nor, as will appear, does it involve absolute administrative finality, if that can occur short of or even with payment. Instead, the Supreme Court has held that it means 'A determination, made and recorded in accordance with established administrative practice by the administrative officer or depart-

ment having the contract in charge, *that the contract has been completed and that the final payment is due* * * *'.

In the case of *Christman Company et al.* v. *Michigan Gypsum Company et al.,* 85 F. 2d 474, the Court said: "The term 'final settlement', as used in the act, was not intended to denote payment, but was used to describe an *administrative determination of the amount due upon completion of the contract.* * * *"

"A determination, made and recorded in accordance with established administrative practice by the administrative officer or department having the contract in charge, that the contract has been completed and that the final payment is due, fulfills these requirements".

In *Globe Indemnity Company* v. *United States,* 291 U.S. 476, 54 S.Ct. 499, 78 L.Ed. 924, this Court said on page 927 "The issue presented was whether suit by a sub-contractor upon a bond given under the Heard Act was premature when begun six months after the date of the Department's determination, but less than six months after payment. It was held that it was not; that the term "final settlement" in the Heard Act was not intended to denote payment, but had been used to describe *an administrative determination of the amount due upon* completion of the contract".

It will be observed from the above cases that "final settlement" relates to the time when the amount due under the contract is determined and recorded by the appropriate administrative authority. *It does not re-*

late to the time of "approval" of this determination as was erroneously held by the Trial Court in the present case. The authority to make and record the amount due under the present contract was delegated to Mr. Arnold Olson as the administrative officer of the department having charge of the present contract. It was Mr. Olson's function to make such determination. This was the established administrative practice of the department, although the Deputy Director of Buildings and Grounds "approved" the action of the administrative officer, nevertheless, every prerequisite to the determining and recording of the amount of final payemnt was completed on June 13, 1961.

In *Humphreys & Harding, Inc. et al.* v. *District of Columbia,* 110 U.S. App. D.C. 311, 293 F. 2d 150, the Court said: "And we are committed to the doctrine that (the statute) should be liberally construed in aid of the evident public object-security to those who contribute labor or material for public works".

CONCLUSION

It is respectfully submitted that the Trial Court committed error in holding that final settlement did not occur until June 22, 1961, which was the date of the approval of the payment voucher. This approval was merely perfunctory, no changes were ever made in the determination of the administrative officer, Mr. Olson.

It is respectfully submitted that the Order of the Trial Court and the U. S. Court of Appeals for the

District of Columbia Circuit should be reserved with directions to enter judgment in behalf of Petitioner.

Respectfully submitted,

IRWIN S. LANDAU
501 - 13th St. N.W.
Washington, D. C.

I. IRWIN BOLOTIN
1030 - 15th St. N.W.
Washington, D. C.

Attorneys for Petitioner

Date: April 8, 1965

APPENDIX A

(Filed February 28, 1964)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4071-61

DISTRICT OF COLUMBIA, for the use and benefit of
CAPITAL LIGHTING & SUPPLY, INC., ET AL., *Plaintiffs*,

v.

F. S. BOWEN ELECTRIC CO., INC. and MERANDO, INC., ET AL.,
Defendants.

Order

The issues in the above-entitled action having been regularly brought on for trial before the Court, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law in an oral opinion and directing judgment as hereinafter provided, it is, this 28th day of February, 1964,

ORDERED, ADJUDGED AND DECREED that the complaint be and it is hereby dismissed with costs against the plaintiff.

WILLIAM B. JONES
William B. Jones
United States District Judge

APPENDIX B

(Filed November 10, 1964)

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Senior Circuit Judge, and Bastian and McGowan, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: Nov. 10, 1964

APPENDIX C

(Filed January 19, 1965)

Before: Bazelon, Chief Judge, and Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

Order

On consideration of appellant's petition for rehearing *en banc,* it is

ORDERED by the Court *en banc* that appellant's aforesaid petition is denied.

Per Curiam.

Dated: Jan. 19, 1965

APPENDIX D

Opinion

PROCEEDINGS

The Court. This is the action entitled District of Columbia, for the use and benefit of Capital Lighting & Supply, Inc., et al., versus F. S. Bowen Electric Company, Inc., a corporation, et al., Civil No. 4071-61. This action was brought for money due for material sold and delivered, against an electrical subcontractor, the prime contractor, and surety under the construction bond. The action was brought by the supplier of the electrical equipment, as the use plaintiff. The District of Columbia having failed to take any action under Section 1-804 of the District of Columbia Code, 1961 edition, the use plaintiff instituted the action on December 20, 1961.

The defendant Merando Inc., as prime contractor, entered into a contract with the District of Columbia for the construction of a school, at 534 48th Place, Northeast, in the District of Columbia. As it was required to do by statute, Merando Inc. executed a construction bond with a surety, the surety being the defendant New Amsterdam Casualty Company.

As to the third defendant in the case, F. S. Bowen Electric Company, Inc., the electrical subcontractor, default judgment was entered against it by the use plaintiff.

The question here is whether this action was prematurely brought by the use plaintiff, it being the position of the defendants Merando Inc. and New Amsterdam Casualty Company that it was and that, therefore, it does not lie under the statute—Section 1-804, District of Columbia Code, 1961.

The facts are as follows:

After the defendant Merando Inc. entered into the agreement with the District of Columbia to construct the school,

F. S. Bowen Electric Company, Inc. became a subcontractor for the electrical work. Bowen Company, in November of 1959, contracted with the use plaintiff, Capital Lighting & Supply, Inc., for the necessary electrical fixtures. Capital Lighting & Supply, in turn, contracted to have the fixtures manufactured by Precision Light Corporation—which was dismissed from this case at the end of the plaintiffs' case, it having failed to show a legal claim.

Pursuant to Bowen Electric Company's agreement with the Capital Lighting & Supply Company, the fixtures were delivered to the job site and they were installed in the school by the Bowen Company.

Bowen Company contracted to pay Capital Lighting & Supply $6,409 for the electrical fixtures. No part of this amount has ever been paid.

The general contractor, Merando Inc., received partial payments on its contract from the District of Columbia during the school's construction. On August 27, 1960 the Director of Buildings and Grounds of the District of Columbia accepted the school as being completed. At the same time the Director of Buildings and Grounds instituted the procedure for determining and finally settling the amount due Merando Inc. as a final payment.

On June 19, 1961 the vice president of Merando signed a voucher for miscellaneous payments, this being the final payment, in the sum of $47,523.45. This voucher was prepared by an administrative assistant and the clerical staff in the Department of Buildings and Grounds. The administrative assistant, without referring the voucher to either the Director of the department or the Deputy Director, transmitted the voucher directly to Merando Inc.

Following the signature by the vice president of Merando on June 19, 1961, the voucher was returned to the Department of Buildings and Grounds of the District of Columbia, and it again came to the attention of the administrative

assistant. The administrative assistant, after satisfying himself that Merando Inc. had signed the voucher, as well as the release attached to the voucher, transmitted the same to the Deputy Director of Buildings and Grounds, W. A. Curtis. Curtis and the Director, James Blazer, were the only authorized contracting officers for the Department of Buildings and Grounds of the District of Columbia.

Curtis, as the Deputy Director and the alternate contracting officer, approved the voucher on June 22, 1961. Thereafter the voucher went to the Procurement Department, the Corporation Counsel's office, and finally to the office of the Chief Accountant of the District of Columbia for payment.

The Court finds as a fact that the voucher was not approved, by any authority that had the power to approve the same, until June 22, 1961. The Court concludes that the final settlement on the contract for the school was not made until June 22, 1961, and that, therefore, this action was instituted prematurely. The complaint was filed by the supplier of the electrical equipment, use plaintiff Capital Lighting & Supply, Inc., on December 20, 1961. But the six months' period, during which only the District of Columbia could bring an action on the contract and bond, did not expire until December 22, 1961. Sec. 1-804, D. C. Code, 1961; United States Casualty Co. v. District of Columbia, 71 App. D. C. 92, 107 F. 2d 652.

The foregoing oral opinion will serve as the findings of fact and conclusions of law of the Court, and an order will be entered accordingly dismissing the action.

(At 2:25 p.m. the instant proceedings were concluded.)